UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CONF.152/C.1/SR.3
10 April 1991

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 3rd MEETING

Held at the Austria Center Vienna,
on Thursday, 4 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

CONTENTS

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 1 (d)
Article 1 (e) and (f)
Article 1, proposals for new subparagraphs
Article 1 (a) (continued)
Article 1, proposals for new subparagraphs (continued)

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V.91 37033 0045E
Distr.: 12 April 1991

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The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 1 (d) (A/CONF.152/C.1/L.23)

1. Miss VAN DER HORST (Netherlands), introducing her delegations's proposal (A/CONF.152/C.1/L.23), said that in her country many terminal operators performed other services in addition to the physical handling of goods: for example, they often financed certain services in relation to the transport of goods. During the meeting of the UNCITRAL Working Group, however, it had been agreed that the term "transport-related services" concerned only the physical handling of the goods. Her Government believed that the point should be made clear in the article itself.

2. Mr. LAVIÑA (Philippines) supported the Netherlands proposal.

3. Mr. WALL (United Kingdom) said that his delegation had considerable sympathy with the Netherlands proposal, but thought that, since the proposal set forth an exhaustive list of transport-related services, it would be necessary to examine the proposed list to determine whether it was complete. In addition, it was his understanding that certain activities, such as quarantine measures, which involved handling of the goods but which were in fact a public function undertaken by the authorities, were not to be covered by the Convention.

4. Mr. LARSEN (United States of America) agreed that the definition of transport-related services should not include financial services. However, his delegation did not wish to limit the activities of terminal operators which certainly involved more than physical handling. It was therefore in favour of keeping the existing definition, which would cover not only current services but also those which might be provided by terminal operators in the future.

5. Mr. ROMAN (Belgium) supported the Netherlands proposal. It was essential that the draft Convention should be limited to the physical handling of goods.

6. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that the draft Convention used the word "includes", which indicated that the list of services mentioned was not exhaustive and was given only for the purpose of illustration. The Netherlands proposal used the word "means", which could give the impression that the paragraph contained an exhaustive list of the operations involved in the physical handling of goods. In his delegation's opinion, a broader definition, such as would result from the word "includes", would be preferable.

7. Mr. LAVIÑA (Philippines) supported the existing wording of the paragraph. It was necessary to have as broad a definition as possible, and the word "includes" should therefore be kept.

8. The CHAIRMAN invited the Committee to vote on the Netherlands proposal on article 1 (d) (A/CONF.152/C.1/L.23).

9. The Netherlands proposal was rejected by 11 votes to 3, with 3 abstentions.

Article 1 (e) and (f)

10. Mr. RUSTAND (Sweden) said that the definitions in the two subparagraphs seemed to exclude any possibility of oral notices or requests. His Government considered it preferable to leave it to the parties involved to determine the form in which a

(Mr. Rustand, Sweden)

notice should be given or a request made, in accordance with good commercial practice and their own interests. If the draft Convention required the use of a specific form, that would cause confusion in a number of legal systems where it was up to the courts to decide on the value of evidence presented in writing or orally. He was not making a proposal to delete the subparagraphs in question but thought that the record should state that some delegations had difficulties with the definitions.

11. Mr. TARKO (Austria) supported the view expressed by the Swedish representative. There was also the question of what was meant by "a record of information". During a lengthy discussion of the matter at a meeting of UNCITRAL in 1989, various delegations had expressed different views on the meaning of that term. In his opinion, it would therefore be preferable to delete the two subparagraphs in question.

12. Mr. WALL (United Kingdom) said that his delegation was satisfied with the existing wording of subparagraphs (e) and (f) but took note of the concern expressed by the delegations of Austria and Sweden.

13. Mr. HERBER (Germany) shared the concern expressed by the representatives of Austria and Sweden. He thought that it would be possible to give a notice or to make a request orally and that there was consequently no need for a definition of the terms "notice" and "request" in the draft Convention. His delegation therefore proposed that the two subparagraphs should be deleted.

14. Mr. LAVIÑA (Philippines), noting that the matter had been thoroughly discussed at the most recent session of the UNCITRAL Working Group, said that the majority of delegations had supported the two definitions in question, as he did himself. He appreciated the fact that in some domestic legal systems it was possible to give a notice or make a request orally, but thought that the terms should be defined in the draft Convention in order to have a uniform rule.

15. Mr. BONELL (Italy) thought that subparagraphs (e) and (f) permitted oral notices or requests and simply sought to ensure that there was some sort of record of notices given or requests made orally in order to avoid unnecessary litigation. Given the current state of technology, in particular computerized communication systems, he did not think that the provisions in question would constitute a heavy burden on the parties concerned. In that connection, he referred to other related international instruments, which seemed to adopt the same approach. His delegation was in favour of keeping the existing text of the two subparagraphs.

16. Mr. FILIPOVIĆ (Yugoslavia) thought that the two definitions were not necessary and should be deleted.

17. Mr. MORAN (Spain) was in favour of keeping subparagraphs (e) and (f). Referring to article 11, he said that it was essential for the draft Convention to have a system for notices concerning loss or damage. The need to prove that a notice had been given must also be borne in mind. Consequently, the two subparagraphs were necessary and should be kept.

18. Mr. RUSTAND (Sweden) said that in Sweden, as in many other countries, the law required that the written form should be employed only where important transactions such as the transfer of real estate or the drafting of a will were involved. In

(Mr. Rustand, Sweden)

cases of disputes over other transactions, it was thought best to leave it to the parties concerned to prove their case in court on the basis of either written or oral evidence.

19. In claims under the draft Convention, it would normally be for the operator, carrier or cargo-owner to produce some form of documentation to prove that he had made the notice or request concerned. However, such documentation might well be mislaid or lost, and it would be unsatisfactory if the party involved could not then call upon the testimony of witnesses to prove that the notice or request had in fact been made. To require that such notices or requests be made in a specific form would in his view be unduly restrictive and would tie the hands of judges when cases were brought before a court.

20. The CHAIRMAN invited the Committee to vote on the German oral proposal to delete subparagraphs (e) and (f) of article 1.

21. The German oral proposal was rejected by 18 votes to 6, with 3 abstentions.

Article 1, proposal for new subparagraphs

22. Mr. LARSEN (United States of America), introducing his delegation's proposal (A/CONF.152/C.1/L.5), said there were a number of clauses in the Convention which made reference to "declarations in writing" by the operator. In view of the fact that "writing" in today's world was often electronic, his delegation believed that a specific indication to that effect should be included.

23. Mr. ABASCAL (Mexico) pointed out that his delegation had already submitted a proposal to the Secretariat in connection with the suggestion made in paragraph 3 of the comments by the International Maritime Committee (A/CONF.1/152/7/Add.2) that article 4 (4) should use the terminology which already appeared in the revised Incoterms 1990, to the effect that a document could be replaced by an "equivalent electronic data interchange message". Although in principle he supported the United States proposal, it might be preferable, for the sake of uniformity, to adopt the wording used in Incoterms 1990.

24. Mr. ZHAO Chengbi (China) supported the United States proposal. Since the Convention was likely to remain in force for many years to come, provision should be made not only for more traditional forms of writing, but also for more advanced forms. The revised Incoterms 1990, with which all delegations would be familiar, stressed the importance of electronic messages as a tool to promote the development of international trade.

25. Mr. OCHIAI (Japan) supported the United States proposal.

26. Mr. RUSTAND (Sweden) said that under the Swedish legal system, it would in any event be up to the courts to decide whether "writing" was to be interpreted as including electronic writing, and in practice they would no doubt do so. Thus for Sweden the United States proposal would be superfluous.

27. Mr. HORNBY (Canada) said that electronic writing was already an acceptable form of writing in most States, so that the addition was not strictly necessary. Generally, it was inadvisable to add to a text definitions of terms that were already well understood, since to do so might lead to problems of interpretation. For example, the addition might be taken to imply that where electronic writing was not specifically referred to in other instruments, it was therefore excluded. The Convention should be kept as flexible as possible.

28. Mr. LEBEDEV (Union of Soviet Socialist Republics) supported that view. Technology was constantly evolving, and in the not too distant future new forms of writing might well be introduced. Unless article 1 was to include a general definition covering all possible forms that writing might take, it would be best not to single out one particular form for emphasis.

29. Mr. LAVIÑA (Philippines) pointed out that the United States text contained the word "includes", implying that other forms besides electronic writing were covered: its intent was merely to ensure that electronic writing was not excluded. Article 1 (8) of the Hamburg Rules already contained a definition of "writing" as including, inter alia, telegram and telex. He saw no harm in adding the United States text, since it would dispel any possible doubts on the issue and would be of help to some States.

30. Mr. WALL (United Kingdom) agreed with the representatives of Canada, Sweden, and the USSR that the proposed definition was neither necessary nor helpful.

31. Mr. ABASCAL (Mexico) noted that the definition was not exclusive; in addition, it would have the merit of covering any new forms of writing that might be developed in the future. Whatever the outcome of the present discussion, he would like his own delegation's proposal in relation to article 4 (3) to be taken up at a later stage.

32. Mr. ROJANAPHRUK (Thailand) said that even for States where it was left to domestic courts to interpret the term, it would be an advantage to include such a definition, since then the courts would have no alternative but to accept it. Although electronic writing was already regarded as acceptable, there was still no harm in including the definition, which in any case was not exhaustive. He supported the United States proposal.

33. Mr. BONELL (Italy) said that while he appreciated that any definition was bound to have certain disadvantages, he too had some sympathy for the United States proposal. It was clear from the wording of the text that it was not in fact intended as a definition, but simply a reminder that electronic writing, the most important and frequently used means of communication in the context of the Convention, was covered by the term "writing". The Committee should also bear in mind that a definition of "writing" was included in a whole series of earlier conventions, such as the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927, the New York Convention, 1958, and the Geneva Convention, 1961, not to mention the 1978 Convention (the Hamburg Rules). For the Convention now under discussion to omit such a definition, therefore, might lead to difficulties of interpretation.

34. However, should the majority of the Committee be opposed to including such a text, he would strongly support the Mexican proposal that a reference be made to the Incoterms formulation in the context of article 4.

35. The CHAIRMAN noted that a number of earlier instruments specifically defined the means of communication (telegram, telex) covered by the term "writing". More recent Conventions, notably the two UNIDROIT Conventions (Ottawa 1988), included the same form of words as was used in subparagraphs (e) and (f).

36. Mr. BERGSTEN (Executive Secretary) said that "writing" was explicitly mentioned in the draft Convention in only two places, once in the substantive portion (article 12 (4)) and once in the final clauses (article 25 (1)). A definition in article 1 would, of course, apply to the final clauses as well as to

(Mr. Bergsten, Executive Secretary)

the substantive part. In addition, three other articles, namely 1 (e), 1 (f) and 4 (3), had wording which was similar to that used in other instruments and which was intended to cover computer-to-computer messages.

37. Mr. ROMAN (Belgium) said that his delegation would not, in principle, be opposed to the United States proposal if sufficient guarantees of authenticity were provided.

38. Mr. RAMBERG (Observer, International Maritime Committee) remarked that adoption of the United States proposal would in no sense invalidate the suggestion made by the Mexican representative with regard to article 4 (3). The expansion of electronic data interchange and frequent replacement of written documents by electronic messages made it necessary to indicate with absolute clarity that the term "document" included such new methods of communication. Referring to the 1990 revision of Incoterms, he suggested that the proposed addition to article 4 (3) might read as follows "... and may be replaced by an equivalent electronic data interchange message".

39. Mr. BONELL (Italy) said that if the words "declaration in writing" in article 12 (4) were replaced by the word "notice", a definition of which had already been approved in article 1 (e), and if article 4 (3) were amended along the lines suggested by the previous speaker, there would be no need for a definition of "writing".

40. Mr. LAVIÑA (Philippines), noting that almost all existing conventions included a definition of "writing", expressed the view that, for the sake of uniformity, a definition should be included in article 1.

41. Mr. LARSEN (United States of America), again emphasizing the importance of the question of principle raised in his delegation's proposal, said that he was prepared to go along with the idea just put forward by the Italian representative and to leave the matter in abeyance pending consideration of article 12.

Article 1 (a) (continued) (A/CONF.152/C.1/L.29)

42. The CHAIRMAN, drawing attention to a proposal by the Belgian delegation concerning article 1 (a) (A/CONF.152/C.1/L.29), said that, since the proposal had been circulated after the Committee's adoption of article 1 (a), a decision to consider it would fall under rule 33 of the rules of procedure, which required a two-thirds majority of the representatives present and voting.

43. Mr. WALL (United Kingdom) said that undue haste in adopting decisions, as well as any tendency to apply procedural rules too strictly, was to be deprecated. The practice of taking indicative votes was a useful means of sounding a committee's general feeling. Rather than take a formal vote requiring a two-thirds majority, the Chairman might perhaps ascertain whether any delegation objected to considering the Belgian proposal. His delegation, for one, had no such objection.

44. The CHAIRMAN said that the Committee had adopted its rules of procedure and had to comply with them. It went without saying that procedural rules would be applied in a flexible manner.

45. Mr. ROMAN (Belgium) said that his delegation endorsed the views just expressed by the representative of the United Kingdom. It was surprising to note that the Committee was required to vote on some proposals while others were forwarded

(Mr. Roman, Belgium)

directly to the Drafting Committee. He stressed the importance of his delegation's proposal and pointed out that the Committee had not yet completed its consideration of article 1.

46. Mr. BONELL (Italy) expressed unconditional support for the Chairman's ruling.

47. The CHAIRMAN invited the Committee to vote on the proposal to reopen the discussion on article 1 (a).

48. There were 16 votes in favour, 12 against and 6 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.

49. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that his delegation had abstained because, while recognizing that it was the Chairman's duty to apply the rules of procedure, it shared the United Kingdom representative's view that formal votes should be avoided where possible in the interests of achieving consensus. If an indicative vote had been taken, the Belgian proposal could have been discussed notwithstanding its late submission.

Article 1, proposals for new subparagraphs (continued)

50. Mr. RUSTAND (Sweden), introducing his delegation's proposal to add a definition of "carrier" in article 1 (A/CONF.152/C.1/L.28), said that the underlining in the text should be deleted. It was suggested that the proposed definition should be inserted as subparagraph (b), the subsequent subparagraphs being renumbered accordingly.

51. The proposed definition had been prompted by the amendments to the second sentence of article 1 (a) and the introduction of the word "carrier". If there were no definition of the concept of carrier, it would be unclear whether the word referred to the performing carrier or the contracting carrier. The Hamburg Rules provided guidance in that respect. Secondly, it would be unclear whether it referred to the servants, agents and other persons used by the carrier for the performance of the carriage contract. The Multimodal Convention provided the necessary guidance in that regard, since the draft Convention now under consideration was intended to cover all goods irrespective of the mode of transport. Thirdly, a definition of the term "carrier" would avoid the problem of conflicting definitions in the various transport conventions and contribute in some measure to the unification of law. He drew attention to the different conceptions prevailing in different countries in relation to the Hague-Visby Rules and the Hamburg Rules. Finally, without such a definition, the somewhat hastily adopted amendment to the last sentence of article 1 (a) would make the draft Convention less attractive to many countries that might otherwise have acceded to it.

52. The CHAIRMAN invited the Conference to consider whether a definition of the term "carrier" was needed or whether it was adequately defined in existing conventions and domestic legislation.

53. Mr. FILIPOVIĆ (Yugoslavia) expressed support for the very broad definition of "carrier" in the Swedish proposal, covering the carrier's servants, agents and independent contractors. The amendments introduced to article 1 (a) at the previous meeting would otherwise have left a gap in the draft Convention, in which the definition of "carrier" would have been open to interpretation.

54. Mr. SWEENEY (United States of America) said that his delegation would have difficulty in accepting a definition of "carrier" at the present stage of the deliberations. The proposed Convention was not a carriage convention; it sought to deal with the problem of a period not covered by existing carriage conventions that was an essential stage in the movement of goods in international trade. The Swedish proposal would add yet another definition to existing definitions in the various transport conventions and was indeed at variance with some of them. For that reason he would prefer to avoid any definition of "carrier". However, if some definition was considered necessary as a result of the amendments to article 1 (a) adopted at the previous meeting, he would suggest that the relevant conventions covering the different modes of transport should be identified and that, for the purposes of the draft Convention, a carrier should be deemed to be whosoever was so defined in terms of those conventions, with the possible addition of the Hamburg Rules and the Multimodal Convention, which were expected to enter into force in the near future. Adding that the term "other persons" in the Swedish proposal presumably referred to independent contractors, he reminded the Conference that the liability of independent contractors had been considered during the discussions on the Hague-Visby Rules and the Hamburg Rules but had been rejected.

55. Mr. WALL (United Kingdom) said that he appreciated the arguments put forward by the United States delegation, but considered it appropriate to include some single, broad definition of "carrier" in article 1, now that the word appeared in article 1 (a). He suggested that informal consultations should be held to work out a satisfactory alternative to the Swedish proposal, along the lines of the United States delegation's suggestion that a definition should be based on the definitions contained in existing conventions.

56. Ms. SISULA-TULOKAS (Finland) said that her delegation, representing a country with the same legal background as Sweden, supported the Swedish proposal. The fact that definitions existed in a variety of existing or future conventions did not dispose of the problem at hand.

57. Mr. BONELL (Italy) expressed support for the United Kingdom suggestion to seek a different definition of "carrier" for the purposes of the draft Convention, along the lines suggested by the United States delegation.

58. The CHAIRMAN, summing up the discussion, said that the Conference had before it a Swedish proposal which had been supported. The United States delegation had put forward the idea, which had also received support, that any definition should merely refer to conventions already in force. He therefore suggested that a vote should be taken on the Swedish proposal, leaving open the possibility for delegations wishing to draft a definition based on existing conventions to hold consultations and submit an alternative proposal.

59. Mr. HERBER (Germany) said that his delegation, like the United States delegation, was opposed to the definition contained in the Swedish proposal; it had indeed some doubts as to whether an acceptable definition could be found. He suggested that a vote should be deferred until the conclusions of the informal working group proposed by the United Kingdom delegation were known.

60. The CHAIRMAN said he took it that the Committee agreed to the proposal by the United Kingdom delegation to set up a working group to determine whether a definition of "carrier" should be included and, if so, how it might be drafted. The Committee would return to the discussion when the working group had completed its work.

61. It was so agreed

62. Mr. WALL (United Kingdom) said that both Mexico and the International Road Transport Union (IRU) had proposed that there should be a definition of the term "person". The standard definition was that the term included both physical and juridical persons; his delegation considered that there would be no harm in including such a definition in the draft Convention.

63. Mr. ABASCAL (Mexico) said that the position of his Government was that there was some uncertainty, not about the strict definition of the term "person", but about the "person entitled to take delivery of the goods", an expression used in several articles of the draft Convention. However, because of the difficulty of formulating a definition and for reasons of time, Mexico had decided not to submit a specific proposal.

64. The CHAIRMAN said that the Mexican representative's explanation supported his own conclusion, which was in conformity with the rules of procedure, that it would not be advisable to reopen the debate every time a proposal or a new idea was put forward. He reminded the Committee that observations made by Governments between the forty-fourth session of the United Nations General Assembly and the convening of the current session of the Conference would be examined only if submitted in writing at the Conference itself.

65. Mr. WALL (United Kingdom) said that his delegation wished to give formal notice that the United Kingdom would submit a proposal concerning the definition of the term "person" and requested that the discussion on article 1 should be left open to allow the Conference time to consider that proposal.

66. The CHAIRMAN confirmed that, since it was the first time that that particular question was being discussed, the debate on article 1 would remain open for a discussion on the definition of the term "person". He requested the United Kingdom delegation to ensure that any proposals were received in good time.

67. Mr. WALL (United Kingdom) said that his delegation reserved the right to introduce a proposal at any time during the Conference as and when the United Kingdom deemed it appropriate to do so.

68. Mr. SOLIMAN (Egypt) drew attention to certain drafting inconsistencies between the Arabic and English versions of article 1 (a), (d), (e) and (f). The Egyptian delegation had submitted written amendments to the Arabic text, which it hoped would be taken into account.

69. The CHAIRMAN said that the Drafting Committee would be advised of the inconsistencies between the Arabic and English versions.

The meeting rose at 12.30 p.m.